

1 IN THE UNITED STATES DISTRICT COURT  
2 FOR THE DISTRICT OF HAWAII  
3 )  
4 WAYNE BERRY, a Hawaii citizen, ) CV 03-00385 SOM-LEK  
5 )  
6 Plaintiff, ) Honolulu, Hawaii  
7 vs. ) August 30, 2004  
8 ) 9:00 A.M.  
9 HAWAII EXPRESS SERVICE, INC., )  
a California corporation, ) Plaintiff's Motion for  
et al., ) Issuance of Preliminary  
10 ) Injunction  
11 Defendants. )  
12 )

10 TRANSCRIPT OF PROCEEDINGS  
11 BEFORE THE HONORABLE SUSAN OKI MOLLWAY  
12 UNITED STATES DISTRICT JUDGE

## 12 APPEARANCES:

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1 MONDAY, AUGUST 30, 2004 9:05 O'CLOCK A.M.

2 THE CLERK: Civil 03-385 SOM-LEK, Wayne Berry  
3 versus Hawaii Express Service, Inc., et al. This case has  
4 been called for Plaintiff's Motion for Issuance of  
5 Preliminary Injunction.

6 Counsel, please make your appearances for the  
7 record.

8 MR. HOGAN: Good morning, Your Honor. Timothy  
9 Hogan on behalf of plaintiff Wayne Berry, who is also  
10 present, Your Honor.

11 THE COURT: Good morning.

12 MR. LIEBELER: Good morning, Your Honor. Eric  
13 Liebeler with Kirkland & Ellis, representing now what is  
14 the Fleming post-confirmation trust, given that the plan  
15 has been confirmed.

16 THE COURT: Okay.

17 MR. SMITH: Lex Smith, local counsel for Fleming  
18 and also counsel for C&S Wholesale Grocers, C&S  
19 Acquisitions, and C&S Logistics.

20 THE COURT: Okay.

21 MR. HOSODA: Good morning, Your Honor. Lyle  
22 Hosoda and Raina Mead, appearing on behalf of the  
23 individual defendants Mark Dillon, Brian Christensen, and  
24 Teresa Noa.

25 THE COURT: Okay.

1 MS. PORTER: Good morning, Your Honor. I'm  
2 Emily Reber Porter on behalf of defendants Hawaiian  
3 Express Service, Inc., HES Transportation Services, Inc.,  
4 California Pacific Consolidators, Jeffrey Graham, and  
5 Peter Schaul.

6 THE COURT: Okay.

7 MS. MORGAN: Good morning, Your Honor. Julia  
8 Morgan on behalf of Hawaii Transfer Company, Limited.

9 MR. COLOMBE: Your Honor, Leroy Colombe for  
10 defendant Foodland Super Market, Limited.

11 THE COURT: Okay. Well, it took so long I'm  
12 exhausted already just by having counsel enter their  
13 appearances. There are so many attorneys.

14 Well, good morning to everyone. You can all be  
15 seated.

16 I sent out a whole list of questions, and I  
17 would like to start with getting some answers and then  
18 we'll take the evidence. But that just might help to  
19 frame the evidence as I hear it, but, if I could just have  
20 some summary of this, I think it will help me understand  
21 the evidence a little bit.

22 I don't know who wants to take a shot at this.  
23 You want to start, Mr. Hogan. I just want really brief  
24 answers. Just go down the list but as brief as possible  
25 because I know we have other things.

1                   MR. HOGAN: Yes, Your Honor. Shall I use the  
2 lectern.

3                   THE COURT: Yes.

4                   MR. HOGAN: Thank you, Your Honor. Timothy  
5 Hogan on behalf of Mr. Berry.

6                   I'm not sure how the court likes to proceed, if  
7 it's just to go down the list?

8                   THE COURT: Yes. Just go down the list, but  
9 keep it short.

10                  MR. HOGAN: Very good, Your Honor. I can't  
11 comment as to what Mr. Dillon's position is as to number  
12 1, Your Honor.

13                  THE COURT: Okay.

14                  MR. HOGAN: As to -- I believe that there is --  
15 in rebuttal to that in the transcript of the July 26th  
16 proceeding, which was exhibit A to the Hosoda declaration  
17 filed in support of the opposition of the individual  
18 defendants, at pages 95, line 17 to 25, Mr. Dillon says  
19 that he kept these documents as part of his professional  
20 documentation that is kept as materials having to do with  
21 his function maintaining computers and software.

22                  So that is in the record, Your Honor, at exhibit  
23 A, Hosoda declaration, 95-17. Not simply to do with the  
24 litigation but also to maintain the system.

25                  THE COURT: Okay. But is there something about

1 it being deleted sometime before July 2004?

2 MR. HOGAN: There is nothing in the record that  
3 I am aware of, Your Honor, anywhere in these  
4 proceedings.

5 THE COURT: Okay. I may hear from other  
6 counsel.

7 Okay. Number 3.

8 MR. HOGAN: Number 3, Your Honor, yes.

9 THE COURT: If you don't have an answer, you can  
10 skip and I'll go to Fleming's counsel.

11 MR. HOGAN: Okay. As to number 2, I would  
12 require Mr. Dillon to be able to address number 2, Your  
13 Honor. I don't want to state facts that are not in the  
14 record.

15 Number 3 --

16 THE COURT: I'm sorry. I thought that's what  
17 you were on.

18 MR. HOGAN: I apologize, Your Honor.

19 THE COURT: Got it. You're on the second part  
20 of number 1 now.

21 MR. HOGAN: Second part of number 1.

22 THE COURT: Okay. Got it.

23 MR. HOGAN: As to number 2, Your Honor, I  
24 believe there is prior testimony that I believe can be  
25 adduced in this proceeding, if Mr. Dillon is here, that

1 will deal with the issue of when these things -- what was  
2 there when July concluded of last year.

3 THE COURT: Okay. Number 3.

4 MR. HOGAN: Number 3, Your Honor, I believe the  
5 same as the other, Your Honor.

6 THE COURT: Why don't you skip to number 5,  
7 then.

8 MR. HOGAN: Yes, Your Honor. Thank you.

9 Your Honor, we've never actually gotten the  
10 actual copies of the files. What we have are images of  
11 the directory structures of the computers; so we can only  
12 comment as to what those reports indicate. And we can do  
13 that, Your Honor, as to whether or not these -- we believe  
14 that they were the derivative files of Mr. Berry's system  
15 because there's testimony that they did not have a copy of  
16 the original. That does not seem to be disputed, Your  
17 Honor, that there was no original 1999 copy of what  
18 Mr. Berry allowed Fleming to use anywhere on the Fleming  
19 or now C&S systems at any time after the filing of the  
20 bankruptcy.

21 THE COURT: Can you go to number 8.

22 MR. HOGAN: Certainly, Your Honor.

23 If we go to Mr. -- we have the e-mail, Your  
24 Honor, that talks about -- and I've got to pull my file.  
25 There is an e-mail that talks about using A4-ing specs.

1 They talk about Manugistics, Your Honor.

2 In Mr. Berry's declaration at paragraph 16 he  
3 talks about what his system is used and it's used for  
4 tracking freight allowances. That's in his declaration  
5 filed in support of the motion, Your Honor. The file that  
6 we're talking about later, Your Honor, the one that comes  
7 up in exhibit T that has the descriptions of the files,  
8 talks about allowances, Your Honor. That is what that  
9 file was looking at. At least there's an indication the  
10 inference is that it was the freight allowances, Your  
11 Honor, which is the reason we believe that we're here  
12 today: to protect that part of C&S's business.

13 Shall I move forward, Your Honor, on number -- I  
14 believe number 9?

15 THE COURT: Okay.

16 MR. HOGAN: The reason Mr. Kurt's statement is  
17 relevant is because it appears inconsistent, Your Honor.  
18 In his letter he points to a program that was developed  
19 prior to Mr. Berry's copyright's initial creation date of  
20 1993. Later on the evidence in the bankruptcy shows there  
21 was an administrative claim that would make his statement  
22 untrue that there was in fact NETWORKS Transports  
23 operating there. That was a software system that was  
24 developed subsequent to 1993. That's the relevance of  
25 that, Your Honor. It's an inference. It is not in itself

1 going to, I think, win the game.

2 As to number 10, Your Honor, the court was, I  
3 think, looking at a file named number 151. In fact, Your  
4 Honor, looking at the report, it's a computer 151. And I  
5 believe that our position is that the file that was -- has  
6 a 20030629 is a date and it is evidence that, in fact, it  
7 is a file created from a computer number 151 that had to  
8 do with allowance price testing. Consistent with  
9 Mr. Berry's declaration, that is the heart of the system  
10 as to the profitability for its use that we believe is the  
11 reason we're here today.

12 Also again other things would be necessary to  
13 have Mr. Dillon to go into.

14 I believe that is also number 11, Your Honor,  
15 deals with the FHL 151.D01. I'm not sure where that comes  
16 from, Your Honor. I think it may come out of the Gurzi  
17 report as to one of the file numbers. But again FHL, we  
18 believe, would stand for Fleming Hawaii Logistics computer  
19 number 151. And then the file that Manugistics was  
20 looking at had the marker 151, was contemporaneous in the  
21 June, period and was dealing with allowance price testing,  
22 Your Honor.

23 Number 12, if we go to Mr. Berry's declaration,  
24 it's exhibit F to his declaration. At the very top of the  
25 fifth page there is what is in there, Your Honor, are

1 printouts of the meta tags on her page. And it says that  
2 it deals with shipping tracking analysis. This is her  
3 performing functions in Iowa shipping freight related to  
4 West Coast -- generally, West Coast Hawai'i shipments.  
5 And we believe it's evidence that this thing was being  
6 created or at least used by Miss Dillon -- or Miss Noa or  
7 at least intended at some point that it would be used to  
8 operate a freight system similar to Mr. Berry's. We  
9 believe it would be Mr. Berry's system.

10                 Also in the reply her -- I've put in my reply,  
11 Your Honor, in their opposition, the employees'  
12 opposition, Your Honor, they describe two different  
13 systems. Mr. Dillon's description of the system is the  
14 one what looks like a spreadsheet operation. Miss Noa's,  
15 although it appears a different system that is being  
16 updated as she's looking at, I believe that it shows that  
17 she's not sitting there looking at static spreadsheets but  
18 in fact looking at a database. And we've put that in the  
19 record, Your Honor, in the reply.

20                 As to what -- number 13, Your Honor,  
21 earthlogistics, in the Noa declaration at paragraph 23 she  
22 admits she was using it for e-mail for C&S for her  
23 employer.

24                 As to 14, Your Honor, I believe what has been  
25 argued is that because Mr. Berry did not put in the first

1 draft of his worksheets in 1993 as the deposit, that it's  
2 defective. I think the court recognizes here that what he  
3 has to deposit is the best evidence of his original work,  
4 not the original copy of it, and that's what he did.  
5 Mr. Berry's deposit is a copy of the documentation of the  
6 program he installed in October, November of '99, and the  
7 argument by Fleming has been that that was defective  
8 because what he needed to deposit was the original 1993  
9 first draft of any of his original work, which is not the  
10 best version, as the code requires, Your Honor.

11 So I think, if I understand the court's  
12 question, it's the same problem I've been having with it  
13 is he did deposit the one that was on Fleming's system. I  
14 don't think there's a dispute over that. It's just he  
15 didn't go back and pull out one from 1993.

16 THE COURT: And has Judge King addressed this?

17 MR. HOGAN: It was, I believe, raised in the  
18 trial, Your Honor. It went through the trial.

19 THE COURT: And did he decide it?

20 MR. HOGAN: I do not believe there was a ruling  
21 that prohibited the deposit. I believe there is a  
22 post-trial motion that was raised pretrial, Your Honor,  
23 that has never been decided as to the issue of the  
24 deposit.

25 THE COURT: So it's still pending.

1                   MR. HOGAN: That would be, I think, a fair  
2 statement, Your Honor.

3                   THE COURT: Okay.

4                   MR. HOGAN: As to the issue of the right to  
5 terminate, Your Honor, it comes down to a combination of  
6 bankruptcy, contract, and copyright law. The question  
7 that I've always raised, Your Honor, the position I've  
8 taken, is that an infringer does not get to keep the one  
9 copy they made the pirated copies from. I've never found  
10 a case that says that, Your Honor. I just believe that to  
11 be true.

12                  As to the position that it terminated  
13 pre-petition, I believe the court was about to enter an  
14 injunction that would have stopped any use of this  
15 program.

16                  THE COURT: Even the original program?

17                  MR. HOGAN: Yes, Your Honor. I don't believe,  
18 generally speaking, that -- when someone commits a serious  
19 infringement, its a serious material breach that gives a  
20 right to terminate their license. There has to be --  
21 otherwise, a pirate could go to the store and buy a copy  
22 of a DVD, make a thousand copies to sell at the swap meet,  
23 and then argue that that one original copy should be  
24 maintained as his personal property.

25                  THE COURT: Why not?

1                   MR. HOGAN: I think the license is terminable by  
2 the owner of the copyright when someone has infringed it.

3                   THE COURT: What's the law that says, if they  
4 got legitimately copy number 1 and then illegitimately  
5 made copies 2, 3, 4, 5, and 6, that the legitimate right  
6 to have the copy that they went to Blockbuster and paid  
7 \$15 to get somehow gets ripped away from them or they  
8 cannot put that DVD into their machine and play it when  
9 they paid for it? I mean in this case I know its free,  
10 but just take my hypothetical as analogous. What's the  
11 law that says the first one is somehow not available to  
12 the user anymore?

13                  MR. HOGAN: Yes, Your Honor. I think in a  
14 situation where someone has gone out and made a mistake,  
15 made copies, and then wants to keep the original copy --

16                  THE COURT: Say there was a criminal action.  
17 They were even convicted. Why do they have to give up the  
18 first one that they made?

19                  MR. HOGAN: That may be. It's not the case we  
20 have, Your Honor. They don't have a copy of the original  
21 one. They haven't had one. They haven't been able to  
22 operate one since sometime in 2000, and that's the record.  
23 They don't own a copy of it. They haven't got one. They  
24 didn't create this new software from an original copy.  
25 Mr. Dillon's testimony in Delaware was clear that he

1 doesn't have a copy.

2 THE COURT: I thought he took off the appendages  
3 and made it the way it was originally.

4 MR. HOGAN: Your Honor, again I would claim that  
5 to be a derivative of Mr. Berry's system, and he does not  
6 have a license to make a derivative. Only Mr. Berry can  
7 make a derivative under 106 of the Copyright Act. He  
8 didn't have a copy of the original. He made a copy from a  
9 derivative.

10 THE COURT: Okay. Can you -- I think we've kind  
11 of been talking about some of these. Go to number 17.

12 MR. HOGAN: 17, yes, Your Honor.

13 THE COURT: You know what, I don't think I got  
14 an answer to number 15.

15 MR. HOGAN: Okay.

16 THE COURT: So you said that the license was  
17 terminated by the jury.

18 MR. HOGAN: That has been my position, Your  
19 Honor.

20 THE COURT: Okay. So then how come you then  
21 went into bankruptcy court and said you had the right to  
22 terminate a license, if, in fact, you're arguing that the  
23 verdict terminated this thing? Why would you then go into  
24 bankruptcy court and say that you had a right to terminate  
25 something that at the same time you're arguing had already

1 been involuntarily terminated?

2 MR. HOGAN: It's because of inconsistent  
3 positions, Your Honor. And I know that's what I'm being  
4 accused of, but let me just state why the position. We  
5 took the position that it was terminated at the jury  
6 verdict. That was our position, Your Honor. They filed  
7 bankruptcy three weeks after the jury verdict. I am  
8 loathe to take a chance on sending them a termination  
9 letter post-petition that says your rights have been  
10 terminated, and the reason is that, if they had any rights  
11 to it, it would violate the automatic stay. That is my  
12 view. And so I never did.

13 The fact is throughout the case and in this  
14 proceeding and in Delaware the debtor took the position  
15 that they had a license to operate, that that license was  
16 good. In regard to the hearings that were set in July  
17 they took the position that the license terminated  
18 pre-petition, Your Honor. They took that position in  
19 motions that were -- in regard to motions brought in  
20 Delaware that it had terminated pre-petition.

21 My response was it's simply an area -- I don't  
22 have any authority, Your Honor. I've looked for the case  
23 law in this as to -- and the court has identified that I'm  
24 probably not going to find it, that it automatically  
25 terminates by the filing -- by the finding of

1 infringement. I've looked -- I spent the weekend looking  
2 again, Your Honor.

3 Going back to it, Your Honor, what all I can say  
4 is, if it was on the certification exam, I think the best  
5 I could do with what I've got is to say the right -- when  
6 someone infringed is a material breach. I think that's  
7 fairly well established in the law. A material breach  
8 gives a right of rescission. Generally, rescission is  
9 something that a party must effect, and the fact is the  
10 bankruptcy cut Mr. Berry off and he did not terminate the  
11 license in time.

12 THE COURT: Okay. When you say that the  
13 defense -- some of the defendants here argued that the  
14 license had terminated pre-petition -- that's what you're  
15 saying; right?

16 MR. HOGAN: That's correct.

17 THE COURT: Where do I see that?

18 MR. HOGAN: Your Honor, it's not in this record,  
19 Your Honor. They've taken judicial notice of numerous  
20 documents. I do not believe it was in -- it was a  
21 position taken in the estimation motion that was filed and  
22 was heard on the 26th of July, your Honor.

23 And the reason was for that --

24 MR. LIEBELER: Your Honor, I may be able to  
25 clarify on this precise point. I don't want to get in the

1 way of the argument, but this is one I actually can  
2 resolve in fairly short order, with the court's  
3 permission.

4 THE COURT: Okay.

5 MR. LIEBELER: There was an estimation  
6 proceeding that went forward in the bankruptcy court. And  
7 for purposes of the estimation argument what our position  
8 was quite carefully drawn was whether the license is going  
9 forward or whether it is terminated. In either event the  
10 claims should be estimated at zero. We argued expressly  
11 in the alternative and did not make a representation that  
12 the license had been terminated.

13 THE COURT: Okay. So is it Fleming's  
14 position -- I'm having some trouble because, you know, I  
15 wasn't in this bankruptcy court. And I realize there's a  
16 motion for me to take judicial notice and I can certainly  
17 take judicial notice that things happened in the  
18 bankruptcy court without taking judicial notice that would  
19 have the effect of accepting as fact matters that might  
20 not actually be things I have to decide in this case, but  
21 the existence of these proceedings I'm happy to notice.

22 But I can't quite figure out whether there's  
23 this argument being made by Berry about rejecting a  
24 license, and I think it's based on the absence of the  
25 program in matters that were assumed by Fleming. And, if

1 I'm correct in saying that's the basis of saying the  
2 license was rejected, I still have a problem there because  
3 I'm not certain that, if something was given to you for  
4 free, that you have to have said I affirmatively assume  
5 this in order to keep it from being termed rejected. I  
6 mean It's not like a lease where the next month's lease  
7 rent is coming due and you better darn well assume that  
8 lease if you want to still, you know, be operating under  
9 it. I mean this was a free license; right? With no  
10 ongoing payments or --

11 MR. LIEBELER: That's correct. This actually  
12 dovetails into a discussion of inclination 17, and that is  
13 where the court asked for case authority with respect to  
14 sort of what happens ultimately when a plan is confirmed  
15 and anything that has not been assumed is by operation of  
16 law rejected. I actually was able to find a case over the  
17 weekend that addresses the issue. It's a case called  
18 Drexel Burnham Lambert, 138 BR 687. We gave a copy to  
19 Mr. Hogan right before the hearing because I actually got  
20 it from my office early this morning.

21 And with the court's permission I'll read a very  
22 short quote from that case. It reads at page 20 of the  
23 printout that I distributed this morning: "Rejection's  
24 effect is to give rise to a remedy in the non-debtor party  
25 for breach of the rejected contract, typically a right to

1 money damages assertable as a general unsecured claim in  
2 the bankruptcy case. Rejection has absolutely no effect  
3 upon the contract's continued existence; the contract is  
4 not cancelled, repudiated, rescinded, or in any other  
5 fashion terminated."

6 As a consequence of that, if the court's  
7 hypothetical were slightly different and, in fact, Fleming  
8 were to pay money every month to Mr. Berry for this  
9 license, then ultimately the confirmation might give him a  
10 claim for money damages on those license fees. But  
11 there's no argument based on case authority that there is  
12 somehow some nunc pro tunc termination of the contract  
13 back to the petition date that would terminate whatever  
14 license rights that Fleming may have had at that point in  
15 time.

16 As a consequence of that, we do believe that  
17 after the petition date we did have a license to use the  
18 unmodified version of the software. That's consistent  
19 with the pre-petition verdict. And, in fact, I think  
20 Mr. Hogan's articulation of the pre-petition verdict that  
21 because there was one finding out of three of an  
22 infringement somehow terminates the other rights that the  
23 jury implicitly found that we had is simply an absurd  
24 construction of the jury verdict. The fair construction  
25 of the jury verdict is, "Look, you have a right to use it

1 unmodified. You're not allowed to modify it."

2 THE COURT: Okay.

3 MR. HOGAN: If I may address that, Your Honor,  
4 because I just got this case. In this case, Your Honor,  
5 at page 708 this court rejects the Countryman test, which  
6 is the test that I believe is applied in Delaware  
7 regarding executory contract. I just got this case. I  
8 haven't had a chance to Shepardize it. I don't think this  
9 is a case that would be cited very often, Your Honor.  
10 There are cases that I can point the court to now that  
11 this has been raised at this point, Your Honor, where  
12 Judge Walrath has ruled that in fact this is an executory  
13 contract like a lease that has to be assumed before the  
14 confirmation or it's gone.

15 THE COURT: Okay. Okay. I'm going to ask you  
16 very briefly to go to 19 and 20.

17 MR. HOGAN: Yes, Your Honor. 19.

18 THE COURT: I think you're arguing that  
19 Fleming's Excel spreadsheets incorporate Berry's software  
20 not just incorporate Fleming's data.

21 MR. HOGAN: Yes, Your Honor.

22 THE COURT: Okay. So what's the evidence of  
23 that?

24 MR. HOGAN: Well, Mr. Dillon admits in the July  
25 hearing -- and it's cited in Mr. Hosoda's declaration

1 exhibit A at pages 108 at 19, I believe, into page 109,  
2 Your Honor -- that he copied percentages of Mr. Berry's  
3 system into his spreadsheet database.

4 At page 105 of that same transcript that's in  
5 the record he admits that he's running Access and not  
6 simply Excel. Contrary to what has generally been touted  
7 in this case, it is an Access database that's being run.

8 THE COURT: I'm sorry to display my ignorance so  
9 obviously, but why does that help Berry if Access rather  
10 than Excel was being run?

11 MR. HOGAN: I agree, Your Honor. I don't think  
12 it makes --

13 THE COURT: Okay.

14 MR. HOGAN: It doesn't matter, but it's been  
15 said that it can't be Mr. Berry's program because it's in  
16 Excel. And what I'm saying is, well, it isn't just in  
17 Excel. It's in Access. They're running Access, and it's  
18 admitted in that point.

19 That has been, I think, the basic argument that  
20 by copying the data into spreadsheets they did not copy an  
21 Access database because it's in Excel. Well, the  
22 testimony in Delaware made clear that it is actually  
23 Access that's running. It's just simply put data in the  
24 Excel spreadsheets to run Access against it.

25 As far as -- I could put Mr. Berry on the stand,

1 Your Honor. I wasn't going to do that. I didn't think it  
2 was necessary. But he's here to explain what portions of  
3 his unique part of his system -- not related to their data  
4 at all -- that were copied into the Dillon spreadsheets.  
5 I thought that Mr. Dillon would be here, Your Honor, to  
6 address those issues. That was my understanding because  
7 the court's inclination that would be live testimony, that  
8 was, I believe, what I was going to do is to put  
9 Mr. Dillon on and to question him regarding the certain  
10 things that were copied into the system that were not  
11 simply the data, Your Honor, that were the structural --

12 THE COURT: I'm looking at number 20.

13 MR. HOGAN: Yes, Your Honor. The Guidance  
14 issue, Your Honor. All right. What Guidance did is come  
15 in without notice to us during a period where they were  
16 stayed in litigation and there was an order saying don't  
17 anybody destroy anything. I don't think there's any  
18 question those were the situations existing at the time.

19 Without notice to us Guidance came in and made a  
20 copy of what was on the system, which copied the visible  
21 files -- we admit that that appears to be what they did --  
22 then scrubbed those computer systems, Your Honor, and then  
23 copied things back. That's the record.

24 The reason it's destruction of evidence, Your  
25 Honor, is what it did is it destroyed what had been

1 deleted prior to Guidance getting there. Simply, someone  
2 has something illegal on a computer, Your Honor. They  
3 delete it, they dump it out of the deletion box, and then  
4 they make an image of that. They then scrub the computer  
5 and put it back, and they've wiped out the forensics of  
6 what was there.

7 This is a period of time when I don't think  
8 there's any dispute that Fleming was under an SEC  
9 investigation, they had an order to stop them from doing  
10 things of this sort, and all they had to do, Your Honor,  
11 to preserve this evidence is take the hard drives off,  
12 take them away, put them in a closet with Guidance or  
13 someone to lock them up, and then put new hard drives on.  
14 For a couple thousand dollars, Your Honor, they could have  
15 rebuilt this system without destroying any of the  
16 evidence. What they did was to essentially destroy any  
17 ability of anyone to see what had been on there prior to  
18 Guidance coming in. Why they did it, we don't know. We  
19 can surmise. But in any event we believe it did destroy  
20 forensic evidence in this case, that it was in violation  
21 of the court's earlier order prohibiting destruction, and  
22 that it can't be considered fair use under the  
23 circumstances.

24 THE COURT: Okay. I'm going to let defendants  
25 talk really briefly on these questions. Really briefly,

1 though. Wait. Let me get a sense of what kind of  
2 evidence we have. So we have Mr. Berry. You are offering  
3 his declaration in support of your motion; so they're  
4 going to get to cross-examine him live. That's the only  
5 witness you're offering -- only declaration?

6 MR. HOGAN: That is correct, Your Honor.

7 MR. LIEBELER: Just sort of administratively as  
8 a housekeeping matter, Mr. Smith had spoken to Mr. Hogan  
9 on Friday, and Mr. Hogan had said that his inclination was  
10 not to bring Mr. Berry to testify, except by means of  
11 rebuttal. As a consequence of that, we were not planning  
12 to bring Mr. Dillon. We have Mr. Dillon 20 minutes away  
13 and can bring him, but we don't have a declaration and we  
14 didn't get any sort of other declaration from Mr. Berry  
15 yesterday; so he'd be limited to what in his -- the  
16 declaration already filed.

17 THE COURT: Let me make sure I understand. So  
18 he submitted a declaration. I know you have some  
19 evidentiary objections to portions of the declaration, but  
20 other than that no live cross is being requested by the  
21 defense. Am I right?

22 MR. SMITH: That's right, Your Honor, and that  
23 was the discussion I had with Mr. Hogan on Friday as  
24 well.

25 THE COURT: Is that right for all defense

1       counsel?

2                   MR. HOSODA: I did not speak with Mr. Hogan  
3       directly, but in speaking with Mr. Smith -- Mr. Dillon is  
4       my client, and I was told that there was an agreement that  
5       there would be no live-witness testimony, and that's why  
6       Mr. Dillon is not here.

7                   THE COURT: Okay. But you didn't need to  
8       cross-examine Mr. Dillon -- I'm sorry. Mr. Berry live.

9                   MR. HOSODA: Not based upon that agreement.

10                  MR. SMITH: That was not -- the discussion I had  
11       with Mr. Hogan was we would all be submitting on the  
12       papers together with the objections that are contained in  
13       the papers.

14                  THE COURT: Okay. So there's no live -- nobody  
15       needs cross-examination live of any matter set forth in a  
16       declaration.

17                  MR. LIEBELER: That was our thought sort of  
18       working as a group yesterday, Your Honor. Although, we  
19       did discuss the notion that, if the court had specific  
20       questions for Mr. Dillon or otherwise, that that would be  
21       perfectly appropriate, and we could make him available for  
22       that purpose at the court's convenience.

23                  MS. PORTER: Yes, Your Honor. Emily Reber  
24       Porter. Just to make it clear we weren't a party to any  
25       of these discussions last week about who would be live,

1 and our position is that we're not being targeted in this  
2 motion at all.

3 THE COURT: Okay. So nobody's asking for live  
4 cross of anything. As I understand it, they are going to  
5 rest on the papers and arguments that have been  
6 presented.

7 MR. LIEBELER: That's correct, Your Honor.

8 THE COURT: Okay. Then let me invite counsel  
9 for Fleming to go through these questions, and then I know  
10 we might have to go back and forth on some of these  
11 things.

12 MR. LIEBELER: We have a little bit of  
13 transitions. It may make sense, Your Honor, with all due  
14 respect for sort of one of the three of us, being Fleming,  
15 C&S, or Mr. Dillon's counsel, to address these at a time.  
16 So with that, for number 1, I would defer to Mr. Hosoda.

17 THE COURT: Okay. Mr. Hosoda.

18 You folks are going to have to bear with me  
19 because I'm sure I don't understand all the technological  
20 details of what's going on here; so you should make your  
21 explanations accordingly in a way you think I might be  
22 able to figure out. And even then you may be way  
23 overestimating what I can figure out. I'm sure you won't  
24 underestimate it. But go ahead.

25 MR. HOSODA: Thank you, Your Honor. Again Lyle

1 Hosoda for the individual defendants, including Mark  
2 Dillon, Brian Christensen, and Teresa Noa.

3 Your Honor's first question was whether or not  
4 it was Mr. Dillon's testimony that it was proper for him  
5 to retain a copy of the 16 files. I will tell you that  
6 from pages 95 through 98 of exhibit A to my declaration,  
7 which is the testimony given at the confirmation hearing  
8 on July 26th, 2004, in Delaware, I was present at that  
9 hearing, Your Honor, but under direct examination what  
10 Mr. Dillon testified to was that he did not know even  
11 about this allegation of the 16 files even being on the  
12 system until after this motion for preliminary injunction  
13 was filed and served, and his best recollection it was at  
14 sometime in early June of 2004.

15 His testimony thereafter was that he, upon  
16 learning of this, attempted to go back into the computer  
17 files there to try and find out whether they were still  
18 there. At that point he found that those files were no  
19 longer on the computer at C&S.

20 Now, what Mr. Hogan just represented to the  
21 court with respect to what was on these files or what was  
22 happening with these files, he quoted a page 95 and he  
23 went to lines 19 through 22. And I think that's a bit  
24 misleading because what he read was one question and it  
25 was, "And by looking at those path names what can you tell

1 us about those files were on the system in Kapolei?" And  
2 the answer was, "They were on my computer. They were part  
3 of my professional documentation; that is, documents and  
4 materials I keep to have to do with my function with  
5 maintaining computers and software there on a network."

6 Mr. Dillon is talking -- describing generally  
7 about the area of where these files -- he believes that  
8 they were. But what happens is, if you just cut off  
9 there, which Mr. Hogan did, it's misleading because he  
10 continues on on page 96. And there is a question about  
11 what is contained in those actual 16 files to Mr. Dillon's  
12 knowledge, and he says, "This was -- all these directories  
13 are used to keep documentations for the previous lawsuit.  
14 There were collections of documents that I felt were  
15 relevant to the lawsuit."

16 Mr. Hogan attempted to expand and say these  
17 weren't just related to the litigation. Not only that,  
18 but Mr. Dillon says these were examples of things that we  
19 wanted to show the court of what the tables consisted of  
20 but they were sans data. There was nothing in there.  
21 Essentially, he testifies that they were not usable.

22 There is no allegation and no evidence, Your  
23 Honor, of use. They're not saying that Mr. Dillon in any  
24 way used these 16 files to the benefit of Mr. Dillon or  
25 the company, and there's absolutely no evidence of the

1 record of that. I mean -- so Mr. Dillon discovered these  
2 16 files, went back, tried to locate when it was that they  
3 were deleted, who deleted them, at what period. When he  
4 could not tell --

5 THE COURT: Wait, now. Let me make sure I  
6 understand. So he didn't know they were there, and how  
7 did he determine that they had been there?

8 MR. HOSODA: He went back and he used a search  
9 query to attempt to -- with the prefixes he knew of of Mr.  
10 Berry's software to go back with the identifiers that were  
11 used --

12 THE COURT: I'm confused.

13 (Counsel conferring.)

14 MR. HOSODA: I'm sorry. Maybe I misunderstood  
15 your question.

16 THE COURT: Let me ask it this way. When did  
17 Mr. Dillon first realize that there were these 16 files  
18 still on the computer?

19 MR. HOSODA: I'm a little bit troubled by that  
20 question because first he testified that he did not learn  
21 about this until June of 2004 after the motion for  
22 preliminary injunction was filed.

23 THE COURT: Okay. And who told him that they  
24 were still there?

25 MR. HOSODA: He got a copy of the motion from my

1 office and he learned of it at that point.

2 THE COURT: And how did they know? Okay. Wait.

3 Let me back up.

4 You're saying that the first time Mr. Dillon  
5 even knew that there were 16 files with this freight  
6 tracking thing on his computer was when he saw the motion  
7 filed in this case. And the -- I'm confused.

8 So you're saying that then he -- I thought he  
9 had made a copy of these files as a record for pending  
10 litigation. Am I confused about what's going on here?  
11 What was it he made a copy of as a record for pending  
12 litigation if he didn't even know that these files were on  
13 the computer to copy?

14 MR. SMITH: Judge, since I think I was probably  
15 the addressee of the files that we're talking about, maybe  
16 I could help a little bit.

17 During the pretrial proceedings of the case that  
18 went to trial in 2003, in pretrial discovery the  
19 plaintiffs asked for a copy of the database. We refused  
20 to give them the database because it had our confidential  
21 data in it. A negotiation ensued in which I think there  
22 were -- we agreed to produce it to them but with only six  
23 of the fields filled in and with everything else deleted  
24 from it.

25 In addition to that, I went through much of the

1 same learning curve the court is going through today in  
2 terms of trying to understand what this was and how it was  
3 used and that sort of thing; so Mr. Dillon prepared memos  
4 to me and explanations to me. And during that process --  
5 and there were a couple -- I should say during discovery  
6 there are at least two different versions of the database  
7 that we produced to them with great deals of data deleted.

8 Obviously, those versions are not usable, but  
9 those were apparently what was stored here as well as  
10 whatever Mr. Dillon had copied in order to prepare  
11 explanations to me of what this was and how it was used.  
12 So these were in litigation support, sort of, of a  
13 different place where he kept his personal information  
14 that he had prepared for me as well as other personal  
15 things for his job.

16 So he certainly knew they were there when he  
17 prepared them sometime before the trial in March of 2003.  
18 I think the dates on them show 2001 and 2002.

19 THE COURT: I see. So you're saying he made a  
20 copy -- he made an image of what was on the computer  
21 before the trial before Judge King.

22 MR. SMITH: Yes. He made a copy of the  
23 database, which he then kept in a different location. And  
24 he altered it so that it was not usable for the purpose of  
25 tracking freight anymore because he was deleting a lot of

1 the data from it.

2 THE COURT: Okay. So what Mr. Hosoda is talking  
3 about is Mr. Dillon's first realization that after the  
4 jury's verdict in front of Judge King there was still the  
5 16 files on the computer. Or am I still confused?

6 MR. SMITH: Let me chronologically take you to  
7 the next step. We had our trial in March. Now comes July  
8 and we're still facing people, you know, saying that we're  
9 infringing and we're criminals and things. And we want to  
10 deal with that, but we want to preserve evidence; so we  
11 bring in Guidance. We tell Guidance keep a complete exact  
12 image of everything that's on those computers and then  
13 make sure we've got nothing Wayne Berry created there.

14 So Guidance has this image, and they go away  
15 with the image and, you know, the files. Presumably,  
16 files that are not -- that don't have any Wayne Berry  
17 created it get put back on. Now, Mr. Dillon, when he put  
18 his personal files back on, apparently, there were some  
19 copies that he had altered and created for me as part of  
20 that process.

21 Yes. And Dillon -- I think Dillon's testimony  
22 that the court has before it clearly indicates that he was  
23 not aware of that fact at the time that it happened  
24 because the whole intent was for us not to have anything  
25 on your computers that Mr. Berry had created.

1                   So now we're -- this case gets filed shortly  
2 after that. We're in discovery in this case. Mr. Hogan  
3 wants a copy of everything Guidance has. We again tell  
4 him, no, that's got our proprietary information on it, and  
5 without waiving any of his rights we agree what we will  
6 produce to you is a list of file names so you have every  
7 file name that Guidance has. And I phone Guidance, and I  
8 tell them, "Give me the list." They put the list on a CD.  
9 Two lists, actually: one before and one after.

10                  Those gets produced to Mr. Hogan. Mr. Hogan  
11 says something to me about it in February to the effect  
12 that there's -- there are copies of Mr. Berry's programs  
13 on the after image. And I asked him which ones. He chose  
14 not to tell me at that time. In June of this year we get  
15 the motion that has the file names listed on it.  
16 Mr. Hosoda sends that to Mr. Dillon. Mr. Dillon sees it.  
17 So where did he get the information from is from Guidance.

18                  Now, he was unaware at that earlier date that  
19 they had been there, but Guidance's record shows that they  
20 were. I think that -- hopefully, that provides some  
21 context for you to understand Mr. Hosoda's situation.

22                  MR. LIEBELER: And then, Your Honor, to put the  
23 capstone on it what happened after that was after  
24 Mr. Dillon found from the motion that the files were  
25 purportedly still there, according to Mr. Berry, he went

1 back and looked and found out they were not there. So  
2 what we see is that they were deleted sometime between the  
3 time Guidance left on July 7th of 2003 and May 28th or  
4 early June when Mr. Dillon got the motion from his counsel  
5 from Mr. Berry that said they were there.

6 THE COURT: I see. So, when you say they were  
7 deleted sometime before July 2004, you're just looking at  
8 when the motion in which Mr. Berry listed the allegedly  
9 offending files came in such that Mr. Dillon would have  
10 gone to look.

11 MR. LIEBELER: That's correct. And there  
12 actually is an inference from that because, presumably, if  
13 Mr. Dillon had deleted those files a day before, he would  
14 have remembered it when he got their motion. So I think  
15 there's at least a fair inference from the evidence that  
16 is in the record that the files were deleted relatively  
17 early in that yearlong time frame because the later they  
18 are the more likely is that Dillon would remember that.

19 THE COURT: Okay.

20 MR. HOGAN: If I can just say one short thing,  
21 Your Honor. Mr. Dillon's only testimony in regard to the  
22 motion is for him to verify that what was stated in  
23 Delaware was still true. He did not support it with an  
24 additional declaration.

25 THE COURT: Okay. Because, when I get to

1 question 2, I have the statement that Mr. Dillon had  
2 testified that the 16 offending files were deleted  
3 sometime before July 2004, but this actually is not a  
4 statement made in previous testimony. Am I correct?

5 MR. LIEBELER: Well, in your question 2 the  
6 question is the files were deleted sometime before July of  
7 2004. And in the record in the confirmation proceeding  
8 Mr. Dillon testifies that he found out in June of this  
9 year that Berry was saying, hey, the files are still  
10 there. Okay. And then he goes back on page 94 and I  
11 asked him in the confirmation hearing, "All right. What  
12 did you do when you found out that Mr. Berry was alleging  
13 the files were still there?" And his answer was, "I went  
14 back and looked for them, and I found they were no longer  
15 there."

16 THE COURT: Wait, now. Tell me the page number  
17 of what you're looking at.

18 MR. LIEBELER: Sure. I'm at exhibit C to our  
19 opposition, page 94, starting at line 12.

20 "Question. Now, when is it that you found out  
21 that Mr. Berry was claiming that his files were still  
22 remaining on the system?

23 "Answer. It was June of this year."

24 THE COURT: How was it, if he's saying they were  
25 deleted, what would have triggered the deletion of those

1 files when, as I understand Mr. Smith's chronology,  
2 Mr. Dillon thought that everything had been -- from  
3 Mr. Berry had been taken off of the computer and that what  
4 had been then reincorporated into the program was only  
5 non-Berry stuff. Right?

6 MR. LIEBELER: That is correct.

7 THE COURT: Okay. So, if he was mistaken and  
8 what he thought were non-Berry matters included Berry  
9 matters, then what happened to delete these 16 Berry  
10 matters by the time he was able to make the statement to  
11 you in whatever it was, June or something, of 2004 that  
12 there were no longer any Berry matters on his computer  
13 because he had gone back or -- on Fleming, C&S's computers  
14 because he had gone back and checked and they were gone.  
15 If nobody knew they were there, what would have triggered  
16 the deletion?

17 MR. LIEBELER: I understand the question, Your  
18 Honor, and on the current record there is not evidence on  
19 that point. I can make an offer of proof because I've  
20 spoken with Mr. Dillon about this in the last 24 hours,  
21 and I'm happy to make that proffer, but it is not evidence  
22 of record for this proceeding. That discovery hasn't been  
23 taken. So I'm willing to proceed on the basis of an offer  
24 of proof, but I don't want to argue past the evidence  
25 because I'm going to criticize Mr. Hogan for doing that.

1                   So I can either answer it as I believe  
2     Mr. Dillon would testify --

3                   THE COURT: Okay. Why don't you tell me what  
4     he'd say, but it's not really -- it's as if you just put  
5     it in a memo and didn't have --

6                   MR. LIEBELER: Right. I understand that that's  
7     not evidence, and I'm aware of that, which is why I made  
8     the qualification upfront.

9                   Mr. Dillon believes that he was the one that  
10    probably deleted the files. He does not specifically  
11    recall doing so. He believes that it would have been done  
12    as a matter of ordinary file maintenance; that there were  
13    files as the disk runs out of room or whatever it might  
14    be, and things are deleted. But he doesn't recall having  
15    deleted these 16 specific files. He does recall shortly  
16    after Guidance left finding some form of a report -- not  
17    these files but some form of a report related to Berry,  
18    and he does recall deleting that in the time frame of late  
19    July of 2003. But he doesn't have a specific recall on  
20    these 16 files. But he believes that he was the one that  
21    very likely deleted them because no one else had access to  
22    his particular server.

23                  THE COURT: Is there anything in the record  
24    about some periodic purging of files that would occur that  
25    people, you know, once every six months or something would

1 go through their computer files and say, "I don't need  
2 this, I don't need this, I don't need this"?

3 MR. LIEBELER: There is nothing in the record on  
4 that point either, Your Honor. And that's not something  
5 about which I've spoken to Mr. Dillon; so I can't even  
6 make an offer of proof on it.

7 MR. HOGAN: If I may, Your Honor, if I were to  
8 rebut the offer of proof, I would put in a query  
9 Mr. Dillon wrote after July 8th in which he queried the  
10 database to rebut it. I would also put in Mr. Berry's  
11 declaration, paragraph 15, where Mr. Berry says, not just  
12 the 16 files that are on there, there's over a thousand  
13 other reports and programs of his that are on the system  
14 that's never been addressed in any proceeding.

15 THE COURT: A thousand?

16 MR. HOGAN: Thousand.

17 MR. LIEBELER: That's not a rebuttal to the  
18 point about the 16 files, Your Honor. That's some other  
19 frolic and detour on some other issue because those files  
20 have never been specifically identified to us, and until  
21 Mr. Berry does so it's kind of hard for us to do anything  
22 about them.

23 MR. HOGAN: Exactly, Your Honor. The point  
24 we're trying to make is there is evidence that, in fact,  
25 the Guidance images were, as we have stated, Your Honor,

1 nothing but a farce. They created a record that was  
2 presented to court to be able to knock Mr. Berry out  
3 before he got started on this case. But the fact is  
4 Guidance copied back numerous copies of Mr. Berry's works,  
5 so many that it would be absolutely absurd to presume that  
6 just a few fell through the cracks.

7                 In addition, Your Honor, if we look at the exact  
8 copy that we put in the record, I think the court can see  
9 from the size of the files in exhibit P that they're not  
10 simply without data. There are some of these files that  
11 are gigantic files, Your Honor, that I think most people  
12 could see, if it's a copy of the database, that's hundreds  
13 of megs size, compared to the other ones that are a few  
14 meg, that it's something more than simply a stripped down  
15 version of Mr. Berry's software used for litigation.

16                 Also Mr. Dillon testified in the present  
17 tense --

18                 MR. LIEBELER: We're a little off track here at  
19 this point, Your Honor.

20                 THE COURT: I'm just, like, ready to throw up my  
21 hands at this point because, if really what you want is to  
22 rid their computers of all these things, then why not let  
23 this NTI entity go in and do it instead of saying, "Don't  
24 you touch that because, you know, it might be a problem  
25 for you if you do."

1                   I mean, if really the goal of Mr. Berry is to  
2 insure that none of the defendants can touch Mr. Berry's  
3 program, well, does he have somebody he wants to suggest,  
4 short of Mr. Berry himself, who could go in and clean up  
5 their computers, and this would be some neutral party?  
6 And let's see if that person's acceptable to the  
7 defendants. Clear it out. And maybe that person will  
8 report to you it's already cleared out. But what's the  
9 problem with this, if really the goal is to make sure that  
10 Mr. Berry's programs are not being used?

11                  MR. HOGAN: Your Honor, I'll address NTI, I  
12 believe, in my declaration. I spoke to their attorney,  
13 Your Honor, and I said, if we get a court order, I want to  
14 know who's going to own the copies of Berry's software  
15 when the debtor reorganizes. The Guidance Software now is  
16 sitting in a software developer's locker.

17                  THE COURT: Oh, just go ahead and put it into a  
18 safety deposit box and have to have -- both counsel have  
19 to sign off to take anything out of it. I mean what's  
20 wrong with that? They're not going to want these things  
21 they're claiming anyway.

22                  So, you know, lawyers do this kind of thing all  
23 the time with sums of money. I've done it with physical  
24 items when I was in practice. Who is it you would suggest  
25 could do this that your client wouldn't object to, and

1 let's see if there's an objection on their side. They  
2 wanted to do it; so what if they did it, and that would  
3 end this whole thing.

4 MR. LIEBELER: Your Honor, this is the exact  
5 catch-22 that Mr. Hogan puts us in. If we take it off,  
6 we're spoliating. If we leave it on, we're continuing  
7 criminal infringers.

8 THE COURT: Is there some entity that is  
9 acceptable to the plaintiffs that you could name, and  
10 let's see if it's acceptable to the defendants. And, if  
11 so, send that team over, clean it up, put whatever their  
12 work product is into a safety deposit box, have -- all the  
13 attorneys have to sign off on anybody taking it out.  
14 What's wrong with that?

15 MR. LIEBELER: Your Honor, we have a motion  
16 actually in process to have essentially the court appoint  
17 a neutral expert at split cost to do this because,  
18 obviously, what we've tried to do is hire NTI to solve the  
19 problem, and all that does is buy another element or  
20 another hub or spoke to this vast conspiracy.

21 THE COURT: Just be another defendant in the  
22 lawsuit. But I mean this is terrible because, you know, I  
23 am not capable of having somebody stick a computer in  
24 front of me and having me on my own go through and say,  
25 oh, there's an infringing or allegedly infringing program.

1 I mean I'm sorry, but that's asking way too much of me or  
2 of a jury.

3 So what is wrong with your giving me the name of  
4 somebody that you like and seeing if that's somebody  
5 acceptable to them? And, if not, I mean we have lots of  
6 people in this kind of a business who would do this. I  
7 mean I'm sure you could probably come up with five or six  
8 that would be acceptable to everybody.

9 MR. LIEBELER: So we're clear in terms of what  
10 our constraints are, Your Honor, it is our position that  
11 every time Wayne Berry gets ahold of data of Fleming he  
12 publishes it in *The Advertiser*, accuses us of overcharging  
13 Hawai'i consumers, and doing all kinds of things that are  
14 way outside the scope of this litigation. And part of the  
15 rule that we would insist is Mr. Berry himself have zero  
16 access to that material.

17 THE COURT: Right. That's right. He would have  
18 no access. We'd put it into this safety deposit box. I  
19 mean one of the things that could happen -- and this  
20 happens all the time -- this is the first time that you're  
21 here in front of me because you're not in this district,  
22 but these other people, they appear before me all the  
23 time; so I know that you've got a whole bunch of attorneys  
24 that are capable of sticking to a stipulated protective  
25 order where the parties even -- because this happens all

1 the time in this kind of case -- would not even see what's  
2 going on here, and only the experts and counsel would do  
3 so. What's wrong with that kind of thing?

4 MR. HOGAN: Your Honor, we've been asking for a  
5 protective order, and it's been turned down in this  
6 proceeding under the basis that I can't be trusted to obey  
7 this court's order. That's the basis of it, Your Honor.

8 What we've -- we've already had one expert come  
9 in and state under oath to a bankruptcy judge in order to  
10 effect a multimillion dollar sale that this is clear of  
11 Mr. Berry's. Is there any dispute here today that that  
12 was not correct? I don't believe so, Your Honor.

13 So I have a problem with the idea that they go  
14 out and get somebody who we have no notice of to come in  
15 and perform evidentiary matters in my case without notice  
16 to me who are going to make copies of Mr. Berry's software  
17 and transport them out of the state without notice to us.  
18 That I had a problem with, Your Honor.

19 THE COURT: Doesn't have to be transferred out.  
20 You can go to any bank --

21 MR. HOGAN: It's easy, Your Honor.

22 THE COURT: -- and stick this -- I mean it's not  
23 very big, is it, I mean whatever it is you're going to  
24 get?

25 MR. HOGAN: The court -- right now, Your Honor,

1 Your Honor could order that the software hard drives be  
2 removed and maintained. That would take an hour or two  
3 hours of somebody's time. A new hard drive can be  
4 purchased at CompUSA 200 gig for a hundred dollars. There  
5 are 14 hard drives, that's \$1400.

6 THE COURT: Why do I -- I mean don't -- isn't --

7 MR. HOGAN: I'm saying it's very simple.

8 THE COURT: It's embarrassing to me that I'm so  
9 ignorant on this really, but do they really have to remove  
10 their hard drive? Can't they just take an image of what's  
11 on the hard drive and stick whatever -- is it a CD? I  
12 mean I don't know how this thing comes up. I mean can't  
13 you just put that image into the safety deposit box and  
14 then later on we can argue about what is on this image and  
15 is it or is it not infringing and we can have the experts  
16 look at it and counsel.

17 MR. LIEBELER: That's exactly what we tried to  
18 do with NTI, Your Honor, and Mr. Hogan stopped that in  
19 what I regard as just a vicious breach of ethics.

20 THE COURT: I don't understand why it has to  
21 be -- I don't know anything about clearing off this hard  
22 drive or anything, but it sounds to me like there might be  
23 something simpler than doing that. Frankly, I'm not the  
24 person who should be designing the solution here because  
25 whatever disabilities in technology any other attorney in

1   this case may have, I'm sure I'd beat you on those. I'm  
2   sure my failings are far greater.

3                 But what's wrong with naming an expert to start  
4   with or somebody who could go in and figure out what's on  
5   their computer?

6                 MR. HOGAN: Your Honor, that has always -- we  
7   did this once, Your Honor. It's been done twice.  
8   Actually, there was going to be the third time with NTI,  
9   Your Honor.

10                MR. HOGAN: The first time Kroll. The original  
11  litigation there are images that exist on the original  
12  litigation that have been preserved. They're already  
13  out.

14                THE COURT: But now we're looking at what's  
15  there now; right?

16                MR. HOGAN: Exact. We have the Guidance images,  
17  Your Honor, that are at Guidance right now that show the  
18  before and after, Your Honor.

19                THE COURT: But let's look at what's there  
20  today. So what's wrong -- do you object to NTI coming in?

21                MR. HOGAN: I told NTI's attorney that, if we  
22  get a court order that will handle Mr. Berry's software in  
23  a manner in which we can address where it ends up, I'm  
24  happy to work with him. I told him that.

25                THE COURT: So you don't mind their choice of

1       NTI, and NTI could come in, do whatever it takes, I mean I  
2       don't know, to get a copy so that later on everybody can  
3       see what is on the Fleming and C&S computers as of --  
4       let's just pick a date -- September 3d -- let's just pick  
5       that -- 2004, and stick that thing into a safety deposit  
6       box.

7                    MR. LIEBELER: That's assuming I can get NTI  
8       back to the table, Your Honor, because they've been  
9       threatened with a RICO violation at this point, and they  
10      may no longer be interested in dealing with this case.

11                  THE COURT: Okay. So somebody else.

12                  MR. LIEBELER: Right, right.

13                  THE COURT: Why don't we do that? I mean this  
14      seems to me like -- frankly, it just seems sort of  
15      unnecessary to go through this process where I'm supposed  
16      to make findings about whether you've met your burden on a  
17      particular point or not and then, you know, what's the  
18      likelihood of success. I mean it's -- to me the whole  
19      litigation, not just this pending motion, could be  
20      resolved in some way that's probably for people who know  
21      about these things pretty easy. Why not try it?

22                  MR. HOGAN: Well, I guess the problem is, Your  
23      Honor, we come back to what it is that they're operating  
24      today, and that's why we're here.

25                  THE COURT: Okay. But then, if you see what

1 there is there today, okay, the first question is what's  
2 there today because, if there's nothing there today, then  
3 your motion for preliminary injunction is mooted out  
4 because you don't want to enjoin anything if they're not  
5 using your program. Right?

6 MR. HOGAN: Your Honor, I don't think there's  
7 any question that we're going to remain firm that what  
8 they're using is a derivative of the Berry system, the  
9 spreadsheet derivative of the Berry system. What we'll  
10 end up doing, Your Honor, is going through the usual --  
11 we'd love to get real copies of operating systems because  
12 we've never gotten one yet, Your Honor, so that I would  
13 applaud and be happy to get that done. We've never gotten  
14 anything but the ones that Mr. Dillon creates for us that  
15 are stripped down and revised so that we can have our  
16 expert look at that.

17 THE COURT: But you would agree that there are  
18 lots of these freight tracking systems in existence and  
19 that Mr. Berry is not going to be able to say that every  
20 system that could be used to track where freight has gone  
21 or what's coming in must necessarily be a derivative of  
22 Mr. Berry's system. He will not say that; am I correct?

23 MR. HOGAN: I believe Mr. Berry will say that  
24 his is the only system -- it was the first that did what  
25 it does, Your Honor. I can put him on and explain what I

1 mean by that.

2 THE COURT: That isn't an answer.

3 MR. HOGAN: There are trucking programs all over  
4 the place, Your Honor. One for ocean containers, multiple  
5 POs -- that is what this system does -- that handles  
6 multiple transactions going into these ocean containers  
7 from cross-docking operations I would testify -- I  
8 believe Mr. Berry would testify and Griffin, the CIO of  
9 Fleming, says there isn't one.

10 THE COURT: Sounds to me like what you're saying  
11 is no matter what they have it must be a derivative of  
12 Mr. Berry's program, no matter what they have. Is that  
13 your position?

14 MR. HOGAN: Because we have access. There's no  
15 question of years of access with Mr. Dillon, who's created  
16 it.

17 MR. LIEBELER: The short answer is yes, Your  
18 Honor. That's the position he's been taking  
19 consistently.

20 THE COURT: Your position is no matter what  
21 program C&S is using to track its freight it necessarily,  
22 given the nature of its operations, must be a derivative  
23 of Mr. Berry's copyrighted program.

24 MR. HOGAN: Your Honor, if I may, Your Honor,  
25 what I would say is, based on the record in this case

1 today, what is operating at C&S is a derivative of  
2 Mr. Berry's program. Is it impossible for C&S to develop  
3 a program that would not be a derivative? No, it's not  
4 impossible. Did they? No, they didn't. They took a copy  
5 of Mr. Berry's program, sat down at a computer, ran a  
6 query against it, and instantly created their version.  
7 That's the record. That's what happened. They ran it  
8 against a derivative of Mr. Berry's system they weren't  
9 even licensed to use, and they created what they've got.

10 THE COURT: Okay. I think I understand what  
11 your position is.

12 Okay. The concept of reverse engineering and  
13 all of that is fairly familiar to me; so I think I  
14 understand.

15 MR. LIEBELER: There's one subtlety, Your Honor,  
16 that I do want to articulate, and this is a position  
17 Mr. Hogan has taken expressly a couple of times. And that  
18 is that Mark Dillon can't be in any way involved with it  
19 because, as an adjudicated criminal infringer, he  
20 necessarily must infringe no matter what he does. And the  
21 net effect of Mr. Hogan's position is that Mark Dillon's  
22 out of a job. And the defendants are extraordinarily  
23 uncomfortable with that notion. That's not what the  
24 copyright laws insist nor is that a fair construction of  
25 the law. And I just want to make that position clear for

1 today's purposes.

2 THE COURT: Okay. Well, as admittedly  
3 uninformed as I may be on the computer technical aspects,  
4 I actually -- although, I'm not the world's greatest  
5 expert -- but I feel reasonably well-informed on copyright  
6 law in general; so I'm a little concerned that what's  
7 going on here is beyond what was intended by copyright  
8 laws.

9 But anyway let's see if we can come out with  
10 some way to resolve some of these things. I mean I don't  
11 know. Do you folks want to work on such a solution? Do  
12 you want me just to go ahead on the motion, which I can  
13 do. What is the position?

14 MR. LIEBELER: Your Honor, if we might take two  
15 minutes among defense counsel. There are probably  
16 disparate views, and we probably should chat about --

17 THE COURT: Okay. We'll go off the record for a  
18 little while.

19 MR. LIEBELER: We might even be able to have an  
20 amiable discussion with Mr. Hogan in the hallway for a few  
21 minutes.

22 THE COURT: Okay. I'll go off the record for a  
23 little while.

24 (Discussion off the record.)

25 MR. SMITH: Our proposal would be that the court

1 appoint a special master. Could be NTI, and, if NTI is  
2 not agreeable, then some computer expert who is mutually  
3 agreeable. That the master reports to the judge. That  
4 the master answer specific questions asked by the judge  
5 that we can all have input on, and that none of the  
6 contents of the images be shared with the parties without  
7 the court's prior approval. That deals with the need for  
8 a lengthy negotiation or protective order. If we can't  
9 agree, we would come back to you later.

10                   The master could keep --

11                   THE COURT: Puts a lot of burden on me, though.  
12 Gee. That's okay. We'll have a magistrate judge, who is  
13 Judge Kobayashi. She'll be delighted.

14                   MR. LIEBELER: That's convenient, Your Honor.

15                   MR. SMITH: The master can keep possession of  
16 the materials itself, and we would also -- of the images  
17 or whatever is there so the questions to the master the  
18 master would be able to deal with by going back to the  
19 images and looking and seeing what's there.

20                   THE COURT: But, if you say that the contents  
21 would not be shown to the parties, then what happens at a  
22 hearing like this where I might have questions to the  
23 master? Would the parties sit outside so that, if counsel  
24 needed to go and check with the party, the party would be  
25 outside?

1                   MR. SMITH: No, I'm sure -- if you ask a  
2 question of the master, "For example, is there anything  
3 that Mr. Berry wrote on the computer," the master's going  
4 to have to answer that, and we could all hear it. I would  
5 expect -- in fact, Mr. Berry could provide the master with  
6 copies of things that he wrote that we wouldn't be able to  
7 see, and he could ask the master go check if any of that's  
8 there. The master could come back and answer that  
9 question, "Yes, I found these," and at that point maybe  
10 we'd have to see them to know what they're talking about  
11 and probably would agree to delete them at that point.

12                  But that would give you the ability -- it would  
13 give us all the ability to say is there anything there  
14 that Mr. Berry wrote so we can get rid of it.

15                  THE COURT: Because, see, what I have now is I  
16 have -- I mean I don't even have live testimony since you  
17 folks waived cross. I have these dueling declarations.  
18 And I mean, okay, I can make a decision based on them, but  
19 it's not going to solve the case. It will solve this  
20 motion, but the case is going to go on. I think if you  
21 folks wanted to you could wrap up everybody, this whole  
22 case, with a coordinated effort.

23                  So, Mr. Hogan, what do you think about something  
24 like that?

25                  MR. HOGAN: Well, Your Honor, we've always been

1 willing to try to resolve this case. The problem is we  
2 have now been in litigation regarding these infringements  
3 for going on four years. What we were trying to do, Your  
4 Honor, in this motion is to end the part of it that is the  
5 infringement going forward.

6 As to the images, Your Honor, as to what  
7 actually was transferred, the Guidance images are already  
8 there, Your Honor, and that the court can order that those  
9 be produced to the parties and to their experts, Your  
10 Honor, right now.

11 MR. SMITH: Judge, this is where we get funny:  
12 to the parties. You see, the plaintiffs want our data.  
13 They have their newspaper reporter, who published a series  
14 of antagonistic articles about Fleming after they gave our  
15 data to them previously, sitting here in the courtroom,  
16 Judge.

17 We are happy to produce the data. We are happy  
18 to make every effort to make sure there is nothing written  
19 by Mr. Berry on our computers. But we are very  
20 uncomfortable providing any of our data to the plaintiff.

21 MR. LIEBELER: By way of background, Your Honor,  
22 shortly after the petition one of my partners wrote to  
23 Mr. Hogan and said, "Hey, we've taken Mr. Berry's stuff  
24 off of our system, essentially gone back to the original  
25 version." Hogan immediately fired off a letter to federal

1 DCAA auditors, saying, "Fleming now is in violation of the  
2 False Claims Act, and we want you to look into it."

3 That's what he does every time he gets data from  
4 us. We are extraordinarily uncomfortable with giving him  
5 access to any of Fleming or C&S's data going forward  
6 because it's the same story again and again and again.  
7 It's not about the infringement. It's about harming  
8 Fleming and C&S continually. That's our concern.

9 MR. SMITH: But a neutral expert we'll provide  
10 it all to -- a neutral expert who answers to the court,  
11 we're happy to provide it all to. And we're happy to  
12 provide all of Guidance's -- all the images Guidance took  
13 to the same expert.

14 MR. HOGAN: Your Honor, Mr. Smith told me two  
15 years ago that Fleming would rather go to cert denied on a  
16 sanction before ever giving up its data.

17 MR. SMITH: To the plaintiff.

18 MR. HOGAN: Giving up its data. Fleming doesn't  
19 even exist anymore, Your Honor. The data in the Guidance  
20 images is a company that doesn't exist. It doesn't do  
21 business. It is simply left as an SEC target is all  
22 that's left of Fleming.

23 As to what's on C&S's machines, Your Honor, I  
24 would agree C&S has a proprietary interest in going  
25 forward with its business that could be handled through a

1 protective order, Your Honor. I've never violated a  
2 protective order to my knowledge, Your Honor. If the  
3 court limits to experts or counsel and not parties, so be  
4 it, Your Honor.

5 But I would assert, Your Honor, that, if you  
6 were to order -- if this court were to order them to turn  
7 over the materials to us, they wouldn't do it. They  
8 would -- they'd rather be held in contempt.

9 THE COURT: Who's "us"?

10 MR. HOGAN: To me or -- to the plaintiff in this  
11 case, Your Honor, through his counsel or through  
12 experts.

13 MR. LIEBELER: With due respect, Your Honor,  
14 that is an unwarranted smear. I really do take that  
15 personally that -- that's false.

16 MR. HOGAN: That is what Mr. Smith told me, Your  
17 Honor.

18 THE COURT: I don't --

19 MR. SMITH: Certainly, that has been our  
20 position prior to the bankruptcy: that we would appeal  
21 any order that required us to provide our confidential  
22 data to Mr. Berry and Mr. Hogan. That was correct at that  
23 time.

24 THE COURT: Yeah, so what's wrong with appealing  
25 it all the way up to the U.S. Supreme Court? I mean

1 that's your right: you can go up to cert. denied. That  
2 doesn't mean he'd tell his clients to be held in contempt.  
3 I mean --

4 MR. HOGAN: Your Honor --

5 THE COURT: But saying I'm going to take this  
6 all the way up to the U.S. Supreme Court, I don't really  
7 think that that's the same as saying, "And I will violate  
8 a direct court order if the order isn't stayed." I mean,  
9 if he did that, you know, there'd be sanctions and he and  
10 his client, if he were involved, would bear them, and so  
11 be it. But I don't know that that's what was intended by  
12 a statement that my client will litigate this up to the  
13 Supreme Court.

14 MR. HOGAN: It was the sanction.

15 THE COURT: That doesn't --

16 MR. HOGAN: It was the appeal of the sanction,  
17 Your Honor, that I was referring to.

18 THE COURT: Right. But litigating it all the  
19 way up to the U.S. Supreme Court doesn't necessarily mean  
20 a deliberate decision not to follow an order.

21 MR. HOGAN: I leave that to the court, but the  
22 way I interpreted someone saying, if the court sanctions  
23 me for not obeying a court order and that I'm going to  
24 appeal that order all the way up, is a fairly strong  
25 statement.

1                   THE COURT: I don't know. A sanction order is  
2 appealable just like anything else.

3                   MR. HOGAN: Yes, Your Honor.

4                   THE COURT: But in any event, okay, I'll say  
5 this. I know that I'm coming into this as the newest  
6 player, and lots of you folks have been dealing with each  
7 other for a long time, and, obviously, the history has not  
8 all been jolly. So, you know, that happens, but it may be  
9 that it would be a good idea to have a special master.

10                  Is there -- putting aside everybody's outrage at  
11 various statements that have been made about them, is  
12 there, in fact, an objection to the appointment of NTI?

13                  MR. HOGAN: Yes, Your Honor, I do have an  
14 objection to the appointment.

15                  THE COURT: Okay. Then this is what I think  
16 should happen -- well, first, I need to understand what it  
17 is the parties at this point would like to do because we  
18 have several possibilities. One, we can just continue  
19 with the merits of this hearing, and I can rule on this  
20 motion, which is fine. I mean it will make the immediate  
21 issue in front of me go away, but I don't know that it's  
22 going to advance resolution of this lawsuit one way or  
23 another.

24                  Another possibility is to continue the hearing  
25 on this motion and to have the parties, if you cannot

1 agree on a particular master, which I think makes sense to  
2 have but I have no position on which entity or person  
3 should be the special master, but I will send you to Judge  
4 Kobayashi, and you folks can make your arguments to Judge  
5 Kobayashi about who should be appointed by the court. The  
6 horror of it is that then one of you may appeal her ruling  
7 to me; so I'll have it anyway. But that's okay.

8                 But, if that occurred and a special master were  
9 indeed appointed, a couple of things are possible. One, I  
10 just have a better record on which to decide this motion  
11 because right now, as I say, I'm looking at differing  
12 declarations, no live testimony, to decide, well, is there  
13 or isn't there even something to enjoin much less what is  
14 it? But the other possibility that I think might occur is  
15 that I'd never get to the motion because in the course of  
16 having the special master opine on various factual  
17 circumstances it might well be that the parties could  
18 reach a settlement based on more information than either  
19 side now has. And I think that that is actually -- that  
20 would be a good opportunity. It might not work, but it  
21 might enhance the opportunity that you would have to do  
22 that.

23                 So it's your motion, Mr. Hogan. What would you  
24 propose that I do? As I say, I can go ahead and rule on  
25 the motion.

1                   MR. HOGAN: Your Honor, all the things the court  
2 said are all, I think, good ideas. I'm not disputing.  
3 But I think at some point, Your Honor, one of the things  
4 Mr. Berry as an individual -- I know this is not  
5 necessarily something the court has to consider, but it's  
6 something I have to consider is that for him it is, I  
7 think, better to have the court rule on the motion. The  
8 only caveat -- the only qualification, Your Honor, if the  
9 court does not believe that this hearing has given the  
10 court what the court had requested, which I believe --

11                  THE COURT: Well, I still need discussion on  
12 these questions. We kind of got sidetracked here with my  
13 thought that does any of this make sense. But in any  
14 event, if you want to keep your motion on, we can keep the  
15 motion on. Although, that doesn't preclude the  
16 appointment of a special master for other matters.

17                  I'll tell you right now, though, my inclination  
18 just so you know, if I'm ruling only on the papers, is to  
19 deny this motion.

20                  MR. HOGAN: I understand that, Your Honor.

21                  THE COURT: Because here I have these, you know,  
22 dueling statements, and then I look to the burden and who  
23 has the burden. So I mean I'll be happy to listen more to  
24 everybody, but that's what I'm thinking. So you'd end up  
25 with the issue of so how do we proceed from now?

1                   And I think that, if you folks can't agree on a  
2 special master, then probably what should happen is one of  
3 you should bring a motion for appointment of a special  
4 master that would go to the magistrate judge and then you  
5 folks could then fight about who that person should be or,  
6 if somebody wanted to even oppose the appointment of a  
7 special master, because, obviously, that would be a cost  
8 that the magistrate judge would propose a division up.

9 You could do that in a motion to --

10                  MR. HOGAN: It's already been done, Your Honor,  
11 and it was denied. Am I correct?

12                  THE COURT: Not in this case.

13                  MR. HOGAN: Yes. Yes.

14                  MR. SMITH: We made a motion for appointment of  
15 a discovery master early on in the case.

16                  THE COURT: Discovery master is a little  
17 different. Yeah, that's right. I saw that in the docket  
18 sheet that a discovery master had been requested.

19                  A discovery master is not what I understood was  
20 being proposed. The discovery master would talk about,  
21 well, how many depositions can you have and you're being  
22 an obstructionist here or, gee, hurry up and make that  
23 person available, answer the interrogatories now, these  
24 objections are well-taken or not. But this person would  
25 be a computer expert who would be in no position to make

1       rulings on what discovery went beyond the pale or didn't  
2       sufficiently disclose but instead would be, as I  
3       understood it, opining on what is the state of what's on  
4       the computers, which a discovery master would be unlikely  
5       to be able to report on. So I think these are two  
6       different issues.

7                    MR. HOGAN: Okay.

8                    THE COURT: So this issue of a computer special  
9       master has not been presented; am I right?

10                  MR. LIEBELER: That's correct, Your Honor, and  
11       you have quite properly summarized our notion of what a  
12       special master is as opposed to a discovery master.

13                  THE COURT: A discovery master is likely to be a  
14       lawyer, and, certainly, most lawyers will be better able  
15       to look at this than I am, for example, but probably  
16       nowhere near good enough to do what somebody like  
17       Mr. Berry can do.

18                  MR. HOGAN: I agree. And the idea of having  
19       someone who goes out and is able to access the system  
20       without having to give a heads up, go out and walk into  
21       the facility and sit down and see what's running, that  
22       we'd be happy to work toward.

23                  THE COURT: What does that mean without having  
24       to give a heads up?

25                  MR. HOGAN: Your Honor, what we've had to endure

1      in this case is the fact that you cannot do a real  
2      analysis of what's running on somebody's computer where  
3      they get a heads up about when you're coming because, if  
4      you told me I don't want you to have a copy of Word on  
5      your computer, Mr. Hogan, I can guaranty you, Your Honor,  
6      I can remove it before anyone comes in and looks at it.

7                THE COURT: But isn't it the function of these  
8      computer experts that they can tell what used to be on the  
9      computer yesterday or this morning? I mean I cannot. If  
10     you take off my word processing program, I'll just be  
11     dead, but I won't be able to tell. But I'm pretty sure  
12     that, if I call even the court's automation staff, that  
13     they could go into the history and tell me, "You used --  
14     you know what, I pray that they can do that because, if it  
15     crashes and my documents go off, then I call them up and  
16     they come up and I'm just delighted if they can give me  
17     what I had on the computer 10 minutes ago. I mean this is  
18     a miracle to me. But it's not --

19                MR. LIEBELER: The premise of Mr. Hogan's  
20     observation is that we're all vicious criminals on this  
21     side of the table, Your Honor, and we just don't agree  
22     with that. The premise is wrong and the fact of it is  
23     wrong. The computers are going to operate as they're  
24     going to operate, and, if someone is going to go look at  
25     them, we're going to continue to operate them in the

1 normal course until that persons gets there to look at  
2 them and see how they've been operating.

3 THE COURT: But it doesn't matter right now. I  
4 mean the procedures that the special master would follow  
5 could be worked out, it seems to me. But the existence of  
6 a special computer master is not something you're  
7 objecting to; right?

8 MR. HOGAN: The concept is not objectionable,  
9 Your Honor. The question is one of -- I think what we do  
10 with this hearing is probably the principal issue.

11 THE COURT: So you want this motion to stay on,  
12 and I'll go through and hear -- I mean I still have some  
13 questions that, you know, I haven't had answered yet. But  
14 I would think that maybe the best way to do it is for  
15 someone to bring a motion for appointment of a special  
16 master, and in the motion you could propose -- I think it  
17 would be helpful not to just put forth the theoretical  
18 issue of appointment of special master, but to put it into  
19 the context of who would pay and what would that person's  
20 defined duties be and who do you propose be this person.  
21 And then that could be responded to by anybody who was  
22 opposing, and I think the magistrate judge then could make  
23 an informed decision.

24 My own personal thought is that it would help me  
25 to have that. But, as I say, I am saying that in somewhat

1 of a vacuum because I don't know whether the help to me  
2 would outweigh whatever detriment somebody might argue  
3 would exist for a particular setup of special master.

4 MR. LIEBELER: Your Honor, we actually have a  
5 similar motion in process even as we speak, and we can  
6 have that on file within a week, and we'll undertake to do  
7 that.

8 MR. HOGAN: Your Honor, what I would ask, when  
9 the motion is presented, that perhaps a stipulated  
10 protective order be an exhibit so that we can see -- so  
11 we're not doing it in pieces.

12 THE COURT: They're saying they don't need a  
13 stipulated protective order because everything would go to  
14 the special master and people wouldn't necessarily get to  
15 see what was there. Or, you know, it may be that for  
16 starters it may be that you just want the attorneys to see  
17 things. I don't know.

18 MR. HOGAN: Or the experts, Your Honor. It can  
19 be limited to whatever's appropriate.

20 THE COURT: But, as I say, that's why I think it  
21 would be helpful to complete a motion that would have to  
22 lay out these various scenarios and -- because I think  
23 that whatever I'm going to decide on the pending motion  
24 for preliminary injunction is probably not going to make  
25 the case go away, and so in anticipation of seeing all of

1 you again, you know, in the not too distant future it  
2 would help me if this process were at least completed in  
3 time so that, if I am to have the assistance of that  
4 entity, I can have it before further motions.

5               Okay. Hold on. My law clerk is -- this is my  
6 law clerk's last week, okay. So when you say --

7               MR. LIEBELER: We can get this on file by  
8 Friday, if it please the law clerk, Your Honor.

9               THE COURT: But that's okay because, normally,  
10 if you come in on a Monday and have a hearing and I  
11 complete the hearing on a Monday, my normal practice is to  
12 do my darnedest to issue a written order by Friday. So  
13 that's okay. He was going to be working on this anyway  
14 under the normal course. But his question is this: Why  
15 do you want me to go ahead and rule on this when the whole  
16 factual basis may well be either more favorable for you or  
17 different and less favorable for you after I get more  
18 information, assuming that some form of special master  
19 information becomes available to me.

20               I mean, as I say, I can do it. This is his  
21 normal job, and, you know, he's being paid for this last  
22 week, and so what else better to do than to work on this.  
23 But do you really want me to rule when it sounds like the  
24 universe of information available to me will be different?  
25 It may be better for you. I mean it's without prejudice

1 to your bringing this again, but it's just more work for  
2 you.

3 MR. HOGAN: I guess part of it is, Your Honor,  
4 one of the things that seems to come into these  
5 hearings -- and I understand it's because there must be a  
6 threat of some sort of harm -- is the fact that we need to  
7 prove infringement going on in the future; that a simple  
8 showing of infringement isn't enough to invoke an  
9 injunction. And I understand there's cases that go around  
10 that, but I think, based on the record that we put out  
11 there today, Your Honor, there's an admission that C&S has  
12 used the software. There's no evidence of any license by  
13 C&S. That was done in June.

14 MR. LIEBELER: So we're clear the piece that  
15 Mr. Hogan is referring to is a typo in my brief that  
16 should refer to Fleming, as he well knows.

17 MR. HOGAN: It's also in Miss Noa's declaration,  
18 Your Honor. It's in two places.

19 THE COURT: Well, probably the same typo.

20 Okay. But in any event you do want me to go --  
21 because you have several options, one of which is just to  
22 continue the hearing.

23 MR. HOGAN: I think, Your Honor, to bring  
24 Mr. Dillon in and to have -- what I think the court was  
25 expecting is to have live testimony.

1                   THE COURT: It's okay with me if you want to  
2 waive, but you could go ahead and require Mr. Dillon to  
3 come in and testify live. If you want that and you want  
4 that information in front of me, then it seems I don't  
5 have it; so then we would have to continue the hearing.  
6 But what is it your position is?

7                   MR. HOGAN: I guess the question -- Your Honor's  
8 calendar is so tight.

9                   THE COURT: No, no, you know, don't worry  
10 about -- we can probably find a place for you.

11                  MR. HOGAN: The question would be whether would  
12 it be sometime in the foreseeable future, would it be  
13 months down -- we obviously want to stop the infringement.  
14 It's our goal in this motion. And we want to do it as  
15 soon -- if the court's going to deny it, the court's going  
16 to deny it. But we believe that having Mr. Dillon here  
17 would enhance the court's understanding of this case and  
18 our position on infringement.

19                  THE COURT: Okay. But wouldn't it still leave  
20 me with these differing reports without a statement  
21 about --

22                  MR. LIEBELER: Your Honor, I might be able to  
23 cut through at least part of this. I mean just so our  
24 position is clear, if the special master comes back and  
25 says, hey, there are three copies of the 1993 --

1                   THE COURT: You'll take them off.

2                   MR. LIEBELER: -- they're coming off and they're  
3                   coming off as fast as we can get them off consistent with  
4                   preserving them so that we're not accused of being  
5                   criminal spoliators again.

6                   THE COURT: You see, this is not a situation  
7                   where they're fighting that they actually own the  
8                   copyright or there are no copyrights and so we get to use  
9                   them and then I'd have to decide that because --

10                  MR. LIEBELER: Right. The underlying dispute  
11                  that we really are wrestling with is whether or not the  
12                  spreadsheets that C&S is currently using are, in fact,  
13                  infringing Mr. Berry's copyrights. That I think is not a  
14                  question that could possibly go plaintiff's way on the  
15                  record that has been developed thus far, and because of  
16                  that I would make an argument that there's not much point  
17                  to going forward with the motion at this point.

18                  MR. HOGAN: Well, I would disagree, Your Honor.  
19                  Mr. Dillon even gives the percentages of the amount that  
20                  he copied from Mr. Berry in his testimony.

21                  MR. LIEBELER: That's just a misstatement of  
22                  Mr. Dillon's testimony. We don't need to argue about  
23                  that.

24                  MR. HOGAN: The idea -- I guess what I want to  
25                  understand is is it then the belief that the special

1 master will not take a look at the spreadsheets that are  
2 running?

3 THE COURT: The special master can take a look  
4 at whatever it is --

5 MR. LIEBELER: Right.

6 THE COURT: -- that the parties agree to. And  
7 that would be great if that whole issue could be resolved.  
8 So you may have fights about who other than the special  
9 master and the court gets to look at things, but I see no  
10 reason that the special master would be restricted in any  
11 way. I mean the whole purpose --

12 MR. LIEBELER: I haven't taken that position.

13 Of course, the special master can look at anything on the  
14 system that the special master likes. I don't know what  
15 planet that idea is coming from.

16 MR. HOGAN: I just want it to be clear.

17 Your Honor, I guess it comes back to whether or  
18 not we need to have Mr. Dillon here to give the court the  
19 record the court thinks is necessary. We believe we made  
20 a showing that there was copies of Mr. Berry's system  
21 copied and delivered to C&S. We believe that's in the  
22 record. We don't, I believe, need to show much more to  
23 find that that was infringement, Your Honor. C&S doesn't  
24 have a license to use it.

25 The other issues, Your Honor, is, one, whether

1 or not Mr. Berry has met his burden, and, you know,  
2 frankly, we believe he has. We can go forward with the  
3 hearing, Your Honor, or continue it to have live  
4 testimony. But it would be our --

5 THE COURT: I am not requiring live testimony;  
6 so, if you phrase it as I need more to rule, then I'll  
7 just -- if you want the motion to be ruled on, I'll go  
8 ahead and rule on the present record.

9 If, however, your position is that you are  
10 invoking your right to conduct live cross of Mr. Dillon,  
11 then I'll continue the hearing so that Mr. Dillon can be  
12 brought here so that you may conduct live cross. I  
13 understand that the agreement was that he wouldn't be,  
14 but, if, in fact, your position now, having seen questions  
15 from me and so forth, is that you are invoking your right  
16 to conduct live cross of Mr. Dillon, then I will  
17 reschedule this for a supplemental hearing in which you  
18 may, in fact, exercise your right to do that.

19 MR. HOGAN: Yes, Your Honor, I think that's the  
20 way to go.

21 MR. LIEBELER: Procedurally, then, Your Honor, I  
22 think it would be appropriate for us to file a declaration  
23 from Mr. Dillon as a direct as a predicate to the  
24 cross-examination that would take place live, and we will  
25 do that.

1                   THE COURT: Okay. Then --

2                   MR. LIEBELER: If that happens, I would submit  
3                   that we're probably going to want to cross Mr. Berry as  
4                   well. So what's sauce for the goose is sauce for the  
5                   gander, Your Honor.

6                   THE COURT: Don't you folks just want to move  
7                   this over until after you talk to -- well, this is what  
8                   I'm going to do. I'm going to schedule a continued  
9                   hearing, but then you folks go ahead and bring your motion  
10                  for appointment of special master. And it may be that  
11                  I'll have a telephone conference with all counsel after  
12                  that occurs, and I may reschedule this motion for some  
13                  time that may make more sense if you are going to have a  
14                  special master. But right now I just cannot stand if the  
15                  motion is there without some prompt; so I'm going to give  
16                  you another date. Okay?

17                  So I think that, if you're going to get  
18                  declarations in, can you get them in in two weeks, your  
19                  declarations?

20                  MR. LIEBELER: Yes, Your Honor.

21                  THE COURT: So you should get that in by  
22                  September 13. And then let me ask my courtroom manager --  
23                  I'll go off the record for a moment.

24                  Wait. We can go off the record, but were you  
25                  going to fly back in?

1                         (Discussion off the record.)

2                         THE COURT: The hearing on this motion for  
3 preliminary injunction is being continued to Tuesday,  
4 September 28, at nine o'clock. My present law clerk is  
5 delighted, but my new law clerk is really going to be bent  
6 out of shape at having to pick up on this thing that was  
7 partly worked on. We have a prior federal court law clerk  
8 here among counsel. I'm sure she has a very good  
9 understanding of how irritating that is for the incoming  
10 law clerk to have to pick up on this. But in any event  
11 I'm sure that he'll be able to manage.

12                         In the meantime, if a motion for appointment of  
13 a special master with respect to computer software is  
14 going to be filed, I ask that it be filed as quickly as  
15 possible so that Magistrate Judge Kobayashi can consider  
16 that, and, if it is granted, then -- well, whoever's the  
17 moving party on that, if you could write me a letter  
18 telling me what the status is of getting the special  
19 master here or up and running or whatever it is that has  
20 to be done, if you could write me a letter by let's say  
21 the 20th of September, if you can even get a hearing  
22 before then, then that would help me to figure out whether  
23 that hearing date of the 28th is a good date.

24                         Hold on. Let me go off the record a minute.

25                         (Discussion off the record.)

1                   THE COURT: The sooner you file, the better.

2     The magistrate judge is going to be very busy in  
3     September, but she does take some civil things in the  
4     afternoons.

5                   MR. LIEBELER: There actually is some  
6     possibility of working this out as between counsel. I  
7     wouldn't put it at 90 percent, but I'd say it's north of  
8     10 percent.

9                   THE COURT: It sounds to me like a case that  
10    should be resolved. It really does. And, if you're going  
11    to do it, you could do yourselves all a favor by wrapping  
12    in the other case into some global resolution one way or  
13    another.

14                  MR. LIEBELER: Your Honor, I don't want to  
15    characterize settlement negotiations, except to say that  
16    there are several analytical sticking points that we are  
17    just at loggerheads over, and I don't see a resolution of  
18    those. Both parties have tried. I think both parties  
19    have tried in good faith.

20                  MR. HOGAN: Your Honor, just a question.  
21    They're going to submit an affidavit or declaration.

22                  THE COURT: By the 13th.

23                  MR. HOGAN: By the 13th. Would we be able to  
24    submit anything, Your Honor?

25                  THE COURT: No, no. The way this would work

1 is -- I mean, as I understand it, there was an agreement  
2 among counsel as to how to proceed on the evidentiary  
3 portion of this motion; so they didn't do that. But now  
4 that they're going to do it I'm going to treat it as if it  
5 had been attached to their memorandum in opposition.

6 Now, it's true that you could have attached a  
7 supplemental declaration of Mr. Berry in response, and you  
8 can do that.

9 MR. HOGAN: That's what I was requesting, Your  
10 Honor.

11 THE COURT: I'll give you a deadline for it,  
12 then.

13 MR. HOGAN: Thank you, Your Honor.

14 THE COURT: I think I gave you September 13.  
15 I'll give you September 20, Mr. Hogan, if you're going to  
16 do that.

17 MR. HOGAN: Thank you.

18 THE COURT: And then I think everybody should  
19 assume that whoever files a declaration in this latest  
20 round had better show up live. Is that right?

21 MR. LIEBELER: Yes. That's our understanding as  
22 well. So we're clear Dillon's declaration is going to go  
23 to the points that you've raised in the inclination as a  
24 matter of evidence because some of what we've argued today  
25 we just don't have an evidentiary record for.

1                   THE COURT: Okay. And then some of these other  
2 things, I don't think I gave defense counsel a chance to  
3 help me out on some of these other things. If you can do  
4 it in about five minutes, maybe the court reporter can  
5 bear with us. Otherwise, we're going to have to take a  
6 break.

7                   MR. LIEBELER: We can do it. Although, if the  
8 hearing's going to be continued until --

9                   THE COURT: I see. These things are going to  
10 all be addressed --

11                  MR. LIEBELER: Right. And we actually can  
12 address them on the basis of evidence that we're going to  
13 submit; so it would probably make sense to put that off  
14 until the 28th rather than do it now, Your Honor.

15                  THE COURT: Okay. Okay. Great.

16                  MR. HOGAN: Your Honor, just one qualifying  
17 point. I presume that the declaration that I can submit  
18 is Mr. Berry's declaration but not a declaration of  
19 another witness.

20                  THE COURT: I see. You might have -- you could  
21 have a declaration of another witness who wants to rebut  
22 Mr. Dillon's, yeah. But whoever you do submit in  
23 rebuttal --

24                  MR. LIEBELER: It's his burden. I mean in  
25 realistic terms I think we ought to have the opportunity

1 to respond to whatever evidence he has. We should sort of  
2 get the last say on an evidentiary front.

3 THE COURT: Well, who would it be -- would it be  
4 Mr. Dillon who would respond because he'll be here then;  
5 right?

6 MR. LIEBELER: Yeah, Dillon -- fair enough.

7 THE COURT: He'd be here. So the way this works  
8 is normally you give me a written declaration and then, if  
9 the other side wants to cross, then Mr. Dillon would get  
10 to present live cross and then you could do --

11 MR. LIEBELER: Live redirect, essentially.

12 THE COURT: -- a live redirect. Now, I would  
13 make Mr. Berry go first because he's the plaintiff. And,  
14 if the things he's saying really goes to the basis of his  
15 motion, then I mean I'd let you cross him on his original  
16 declarations plus whatever he has, and we can go back and  
17 forth with some additional live testimony if it becomes  
18 appropriate as the hearing goes on.

19 MR. LIEBELER: That's fine. Mr. Hosoda tells  
20 me, Your Honor, that there's some period of time in which  
21 Mr. Dillon will not be in the state. I don't know when  
22 that is, and he's going to try and make a phone call to  
23 determine that.

24 THE COURT: You want to try now?

25 MR. HOSODA: May I have that opportunity.

1                   THE COURT: We'll go off the record. Go ahead.

2                   (Discussion off the record.)

3                   THE COURT: So we're on the record confirming  
4 with the witnesses, too, that we're on for September 28,  
5 unless some counsel upon going back to your offices and  
6 looking at your palm pilots and other things that you  
7 don't have on you finds that there is a problem, in which  
8 case call Miss Fujinaga right away and I'll have a  
9 telephone conference and we'll get another date. Okay?

10                  I thank everybody for their cooperation with me  
11 anyway in this hearing on setting this up, and I -- as I  
12 say, you know, you're very popular, all of you, right now  
13 with my law clerk but not with the new law clerk that  
14 you're going to be facing the next time I see you. So  
15 thank you.

16                  MR. LIEBELER: Thank you, Your Honor.

17                  MR. HOGAN: Thank you, Your Honor.

18                  (Court recessed at 10:53 A.M.)

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DATED at Honolulu, Hawaii, August 31, 2004.

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DEBRA KEKUNA CHUN

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